Supreme Court, U.S.
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No. (1)

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In The Supreme Court of the United States

YI FENG ZHENG,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the Chinese government's outlawing the practice of the Falun Gong and refusal to allow its members to freely practice their religion constitutes persecution on religious of the members of that religion in China.

2. Whether a practitioner of the Falun Gong religion who, as a result of his religious practices, was arrested; imprisoned and subjected to various tortuous indignities for five days; released only after signing a letter denying his religious beliefs and promising never to practice Falun Gong again; and, dismissed from his employment, was subjected to religious persecution.

3. Whether a practitioner of Falun Gong who has already been singled out, arrested and dismissed from his job by the Chinese government for practicing the outlawed Falun Gong religion has a well-founded fear of future persecution in light of the U.S. State Department documenting widespread persecution of Falun Gong practitioners.

4. Whether a mere practitioner of Falun Gong, who is not a leader, has a well founded fear of persecution upon returning to China.

PARTIES TO PROCEEDING

The Petitioner is Yi Feng Zheng. The Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Yi Fei Zheng respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 451 F.3d 1287 (11th Cir. 2006). The opinion of the Board of Immigration Appeals affirming the final order of removal is unreported. The opinion of the Immigration Judge denying relief from removal is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 208(b)(1) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1158(b)(1), provides that the Attorney General of the Secretary of Homeland Security has discretion to grant asylum if an alien meets the definition of a "refugee."

Section 101(a)(42)(A) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1101(a)(42)(A), provides that a "refugee" is a person:

> Who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself for herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

This case concerns the fundamental freedom of religion—one of the very principals upon which the United States was founded. The case involves a question of whether practitioners of Falun Gong, a minority religion that is outlawed by the Chinese government, are entitled to the protections of U.S. asylum law. The Eleventh Circuit United States Court of Appeals in their published opinion has concluded that a follower of the Falun Gong religion who cannot be classified as a "leader" of the movement is not subject to such protection, even when that person has been detained, tortured, forced to renounce his beliefs, and prevented from obtaining employment. This holding is at variance with several other Circuits.

Petitioner, a native and citizen of China, came to the United States in December 2002, fleeing religious persecution in his native country. Petitioner entered the United States without inspection. On December 21, 2002, Petitioner was placed in removal proceedings based on his illegal

entry, pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (hereinafter "INA"). Petitioner filed an application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture (hereinafter "CAT").

According to Petitioner's asylum application and hearing testimony, he began practicing Falun Gong in March 1998. In July 1999, the Chinese government officially banned Falun Gong. On August 18, 1999, Petitioner was arrested and detained. Petitioner met many practitioners of Falun Gong at the detention center. Petitioner was interrogated by public safety officers who told him that Falun Gong was an evil cult and demanded to know the names of his instructor and organization. Petitioner refused to give the officers the information they demanded. When Petitioner and the other detained Falun Gong practitioners went on a hunger strike, they were force-fed. Their jailers also attempted to brainwash them by forcing them to read and watch anti-Falun Gong propaganda. Petitioner initially refused to watch the videos, and the officers dragged him by his arms into the exercise yard, where they forced him to stand out in the hot sun for two hours, until he consented to watch the videos. Eventually, Petitioner was released from detention, but only after signing a pledge to not practice Falun Gong. When he returned to his job, he was informed that he was being discharged because of his involvement with Falun Gong. Petitioner moved back to the rural village where his parents lived, only to learn that the village officers already knew about his Falun Gong

involvement. The officers questioned him and searched his home on several occasions.

The section on "Freedom of Religion" in the U.S. Department of State, *Country Report on Human Rights Practices, 2002 China (incl. Hong Kong & Macau)*(March 31, 2003) [hereinafter "2002 Country Report"] which is included in the record states, among other things:

> The Government continued its repression of groups it determined to be "cults" and of the Falun Gong in particular. Various sources reported that thousands of FLG adherents have been arrested, detained, and imprisoned and that several hundred or more FLG adherents have died in detention since 1999; many of their bodies reportedly bore signs of severe beatings or torture or were cremated before relatives could examine them. . . .
> Since the Government banned FLG in 1999, the mere belief in the discipline (and since January, even without any public manifestation of its tenets) has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. . . .
> In 2001 the Government launched a massive anti-FLG propaganda campaign, initiated a comprehensive effort to round up practitioners not already in custody, and sanctioned the use of high pressure indoctrination tactics in an effort to force practitioners to renounce the FLG. . . . Those who refused to recant their beliefs after weeks of intensive anti-FLG

> instruction were reportedly sent to reeducation-through-labor camps, where in some cases beatings and torture were used to forces them to recant; . . . These tactics reportedly resulted in large numbers of practitioners signing pledges to renounce the movement. (A.R. 87, 91-92).

The immigration judge (hereinafter "IJ") found that Petitioner's claim was credible, however the IJ found that the treatment Petitioner suffered did not rise to the level of persecution. The IJ stated: "A short detention, without any physical maltreatment is certainly not persecution and although he lost his job, he's presented no evidence that he was not able to obtain other type of work or perhaps aid his parents with whatever they were doing to make a living or to farm." The IJ went on to note that, according to the evidence of country conditions in the record, only leaders of Falun Gong were singled out for harsher treatment, and Petitioner was admittedly not a leader. The Board of Immigration Appeals affirmed the IJ's decision without opinion.

Petitioner petitioned for review to the U.S. Court of Appeals for the Eleventh Circuit. That Court held that, "[a]lthough under certain circumstances detention may rise to the level of persecution, Zheng's five-day detention during which he was not harmed does not compel the conclusion that he experienced past persecution." Zheng v. U.S. Attorney Gen., 451 F.3d 1287, 1290-91(11th Cir. 2006)(emphasis in original). The Court also found that Petitioner's termination from his job and

inability to find another job did not constitute persecution because the evidence was insufficient to compel a finding that he was deprived of all means of earning a living. Id. at 1291. The Court held that the questioning and searches he was subject to in his parents' village amounted to mere harassment. Id. The Eleventh Circuit held that the objective evidence of country conditions did not support a finding of overall persecution because "Falun Gong followers were generally released from detention and . . . the harshest punishments were reserved for core leaders of the movement." Id. at 1292. Hence, the Court affirmed the BIA's decision.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision in this case is in conflict with several other Circuits who have addressed the issue of whether followers of Falun Gong are persecuted by the Chinese government.

The Second Circuit

In a case involving a Chinese national who was not a Falun Gong practitioner but merely sold Falun Gong literature at his bookstore, the Second Circuit found that he could be imputed with supporting or practicing Falun Gong. Gao v. Gonzales, 424 F.3d 122 (2nd Cir. 2005). The Court came to this conclusion in part by analyzing the U.S. Department of State, *Country Report on Human Rights Practices, 2000 China (incl. Hong Kong & Macau)*(Feb. 2001). Concerning the Falun Gong, the Court stated:

> There is no dispute that those who are considered practitioners of Falun Gong are subject to persecution in China. According to the Country Report:
> *According to credible estimates, as many as 5,000 Falun Gong practitioners have been sentenced without trial to up to [three] years of reeducation through labor. Human rights organizations estimate that as many as 300 practitioners have been sentenced to prison terms of up to [eighteen] years for their involvement in Falun Gong. According to the Falun Gong, hundreds of its practitioners have been confined in mental hospitals.*
> *Police often used excessive force when detaining peaceful protestors, including some who were elderly or who were accompanied by small children. During the year, there were numerous credible reports of abuse of Falun Gong practitioners by the police and other security personnel, including police involvement in beatings, detention under extremely harsh conditions, and torture ....* Gao at 130.

In further comment on the plight of Falun Gong practitioners in China, the Court states: " . . . the Record does not indicate, a plan to 'eradicate' all those connected with Falun Gong. The Record does, however, clearly indicate a concerted effort on the part of the Chinese government to persecute such individuals." Id. at 132.

Obviously the clear language of the 2000 Country Report (which contains much the same

language as the 2002 edition but is not as explicit) as read by the Second Circuit does not mean the same thing in the Eleventh Circuit.

The Fifth Circuit

The Fifth Circuit also recently examined the issue of the persecution of Falun Gong practitioners in Zhou v. Gonzales, 404 F.3d 295 (5th Cir. 2005). In that case the Petitioner, Zhou, was never actually arrested by the Chinese Government but managed to escape before he was caught, so the issue examined was the well-founded fear of future persecution. In that context, the Court examined the 2002 State Department Country Report, which is part of the record of this case and found that the Country Report clearly supported the proposition that mere followers as opposed to leaders of Falun Gong have a well founded fear of persecution in China.

Regarding the information contained in the 1999 and 2002 County Reports, the Court stated: "The 1999 Country Reports establish that the Chinese government indeed targeted Falun Gong practitioners for punishment. The 2002 Country Reports are even more explicit on this score." Id. At 308. Further, with respect to the prospects for well-founded fear of persecution for the Petitioner in that case, the Court stated:

> . . . the supplemental documentation establishes not only that the Chinese government has the capability and inclination to punish Falun Gong practitioners, but also that it has already done so. Those facts

> require no further elaboration here. (FN14) The two sets of Country Reports confirm that the People's Republic of China is capable of, and intends to, crack down on Falun Gong practitioners.
>
> (FN14) The 1999 Country Reports explain that in July of that year the government of the People's Republic of China initiated a crackdown against the movement, imprisoning thousands and beating those who refused to recant their beliefs. The two Houses of Congress unanimously passed a concurrent resolution condemning those actions. As discussed above, the 2002 Country Reports, which the BIA should have re-opened the record to include, make evident that the Chinese government employed these tactics against not only core leaders but also mere practitioners. Id. at 309.

Finally, in the Zhou case, the Court noted the glaring contradiction between the government's argument against Zhou not being qualified for asylum because he was not a "leader" in the Falun Gong movement and the information contained in the Country Report. Taking issue with the government's contention, the Court stated:

> At oral argument the government took the position that, although the Chinese government may punish mere Falun Gong practitioners (rather than leaders) administratively, such penalties do not amount to persecution within the meaning of the statute. First, the 2002 Country Reports

> reveal the government's contention at oral argument to be inconsistent with the Attorney General's assessment that even lower level practitioners are punished. (FN15) Second, the government is reading into the 1999 Country Reports a clean distinction between leaders and mere practitioners where, in fact, that distinction does not exist. Third, the government cites no support for this proposition, which flies in the face of common sense when we consider that the "administrative" penalties include severe fines, imprisonment, and torture. Id.

Clearly the Fifth Circuit reads the same Country Report in a markedly different way than does the Eleventh Circuit, which apparently adopted the government's argument, which the Fifth Circuit exposed as contradictory and "flies in the face of common sense." Also, it is important to note that the government in the Zhou case clearly conceded that "mere Falun Gong practitioners" were subject to "administrative" punishment, which as indicated above include "severe fines, imprisonment and torture." Id.

The Seventh Circuit

The Seventh Circuit case of Iao v. Gonzales, 400 F.3d 530 (7th Cir. 2005) involved another Falun Gong practitioner, Iao, who was not actually arrested and escaped before the Chinese Government could arrest her. Discussing the plight of Falun Gong practitioners in China the Court stated: "The number of followers of Falun Gong in

China is estimated to be in the tens of millions, all of them subject to persecution." Id. at 533[Emphasis added]. Concerning the government's position in that case, the Court further stated: "The government acknowledges the China persecutes adherents of Falun Gong and that an applicant for asylum need not have experienced persecution (Li has not) in order to have a well-founded fear of future persecution, which suffices for a claim of asylum." Id. at 532 [Citations omitted].

Concerning the Petitioner's well-founded fear of future persecution, the Court flatly stated: "If Li practiced Falun Gong in China, as she testified she did, or if she attempted to practice it upon returning to China, she would face a substantial likelihood of persecution. Id. Clearly, the Seventh Circuit, based upon evidence in the record and the government's own concession, acknowledged that mere Falun Gong adherents or practitioners and not solely leaders, have a well-founded fear of persecution in China.

The Ninth Circuit

The Ninth Circuit has held that any reasonable adjudicator would have to conclude that a Chinese national who practiced Falun Gong would face a clear probability of persecution upon return to China, thereby meeting the higher burden for withholding of removal. Zhang v. Ashcroft, 388 F.3d 713, 718 (9th Cir. 2004). In that case, the alien had not even practiced Falun Gong in China, but had merely learned about it during a visit to China and began to practice it after returning to the United

States. Id. at 715. However, Zhang's family, who still resided in China, also practiced Falun Gong. In 1999, Zhang's brother was arrested for participating in a protest with other Falun Gong members and sentenced to two years in a reeducation-through-labor camp. Zhang's parents then participated in a large Falun Gong demonstration in Beijing, during which they were arrested and forced to write self-criticism letters. After Falun Gong was officially banned, police began searching Zhang's parents' home regularly and put them under constant surveillance.

The Ninth Circuit found that, based on the treatment that Zhang's family had suffered and the fact that the government was aware that Zhang had practiced Falun Gong while in the United States, Zhang had a well-founded fear of persecution in the future. Importantly, the Ninth Circuit noted that the Chinese government's treatment of Falun Gong practitioners amounted to religious persecution. "We recognize that Falun Gong does not consider itself a religion. Nevertheless, the practice is based, in part, on spiritual or religious principles, and the Chinese authorities have banned Falun Gong as a religious cult." 388 F.3d at 719-720. The Court examined the United Nations High Commissioner for Refugees' (hereinafter "UNHCR") Handbook, which stated that religious persecution may take many forms, including:

> prohibition of membership of a religious community, or worship in private or in public, of religious instruction, or serious measures of discrimination

> imposed on persons because they practice their religion or belong to a particular religious community.

Id. at 720. The Court noted that it had found religious persecution where a Christian was arrested, detained, physically abused, and forced to sign an affidavit renouncing his religion. Id. at 720 (citing Guo v. Ashcroft, 361 F.3d 1194, 1203 (9th Cir. 2004)).

Noting that the record demonstrated that the Chinese government had prohibited the practice of Falun Gong and that Zhang would be unable to practice Falun Gong without harm, the Ninth Circuit concluded that there was a clear probability of persecution on account of religion. Id. Importantly, the Court held that Zhang should not be forced to practice his religion privately in China, as this would be "contrary to our basic principles of religious freedom and the protection of religious refugees." Id. at 719.

CONCLUSION

The Eleventh Circuit decision in Zheng v. U.S. Attorney Gen., 451 F.3d 1287, (11th Cir. 2006) is apposite the decisions of the Second, Fifth, Seventh and Ninth Circuits which have examined the same or similar issues and the same evidence in the form of the 2002 Country Report as discussed above.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12818

Agency No. A78-910-135

YI FENG ZHENG,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

[ENTERED JUNE 14, 2006]
(June 14, 2006)

Before EDMONDSON, Chief Judge, HILL and KRAVITCH, Circuit Judges. PER CURIAM:

Petitioner Yi Feng Zheng petitions for review of the Board of Immigration Appeals' ("BIA") decision, affirming without opinion the immigration judge's ("IJ") order. The order denied Zheng's application for asylum and for withholding of removal under the Immigration and Nationality Act ("INA") and for relief under the United Nations Convention Against Torture ("CAT"). No reversible error has been shown; we deny Zheng's petition.

I. BACKGROUND

Zheng, a native and citizen of China, illegally entered the United States in December 2002. After the Immigration and Naturalization Service ("INS") sought his removal, Zheng filed an application for asylum and withholding of removal and for CAT relief. He alleged persecution based on his membership in Falun Gong, a movement banned by the Chinese government in 1999.

In August 1999, Zheng was arrested in China for his involvement with Falun Gong. He was detained for five days, during which time he was forced to watch and read anti-Falun Gong materials and to sign a pledge not to practice Falun Gong under penalty of imprisonment. He was also dragged by his arms to a detention yard where he was made to stand in the sun for two hours.

After his release, Zheng was fired from his job because of his Falun Gong practices. He tried to find other employment in Quandong City, where he lived; but he was unsuccessful. Zheng then went to live with his parents in a rural village. Zheng remained with his parents for three years, but he did not work during that time. Also during this period, local officials watched him and occasionally searched his parents' home for Falun Gong materials. But Zheng suffered no further physical abuse or detention.

Zheng submitted as evidence an excerpt of the State Department's 2002 Country Report on Human Rights Practices for China (the "Report"). The Report states that (1) the Chinese government

continues a harsh and comprehensive campaign against Falun Gong; (2) Falun Gong practitioners can receive punishments ranging from loss of employment to imprisonment; (3) thousands of Falun Gong's followers have been arrested, detained, and imprisoned; (4) several hundred Falun Gong followers have died in detention since 1999; and (5) many of those that died showed signs of torture or severe beatings. The Report also indicates that police often used "excessive force" in detaining Falun Gong members; that many "credible" incidents of abuse and killings by police were reported; and that many members were imprisoned or punished administratively in reeducation-through-labor camps, mental hospitals, or rehabilitative detention. In 2001, the Chinese government "initiated a comprehensive effort to round up practitioners not already in custody" and sanctioned the use of high pressure indoctrination tactics in an effort to force practitioners to renounce Falun Gong. Those practitioners who refused to recant their beliefs were sent to reeducation-through-labor camps, where beatings and torture were sometimes used. But the Report also states that the vast majority of Falun Gong practitioners who had been detained since 2000 had been released and that the harshest punishment was reserved for the movement's "core leaders."

The IJ denied Zheng's application for asylum, withholding of removal, and CAT relief. Although the IJ found Zheng's testimony credible, the IJ determined that Zheng failed to show past persecution or a well-founded fear of future

persecution. On appeal, the BIA affirmed the IJ's decision without opinion.

II. STANDARD OF REVIEW

The IJ's opinion, which was summarily adopted by the BIA, is the final agency determination subject to our review. Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001). We review all legal issues de novo. D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 817 (1 1th Cir. 2004). We review the IJ's factual determinations under the substantial evidence test and must affirm if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole. Al Najjar, 257 F.3d at 1284. "Under this highly deferential standard of review, the IJ's decision can be reversed only if the evidence 'compels' a reasonable fact finder to find otherwise." Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1230 (1 1th Cir. 2005) (citations omitted).

III. DISCUSSION

Zheng contends he suffered past persecution sufficient to compel asylum and withholding of removal given these events: (1) the Chinese government detained him; (2) he lost his job and was unable to find other employment in his home city; and (3) he was subjected to periodic searches by officials in the village where he came to reside. Zheng further asserts that because the Chinese government continues to persecute Falun Gong practitioners, his continued active participation in Falun Gong gives him a well-founded fear of future

persecution should he be made to return to China.[11] After review, we conclude that the evidence does not compel a conclusion that Zheng was entitled to asylum and withholding of removal.

The Attorney General or the Secretary of Homeland Security has discretion to grant asylum if an alien meets the INA's definition of a "refugee." INA § 208(b)(1); 8 U.S.C. § 1158(b)(1)(A). A "refugee" is a person:

> who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42)(A). "The asylum applicant carries the burden of proving statutory 'refugee' status." D-Muhumed, 388 F.3d at 818. And the "denial of asylum may be reversed only if the evidence presented by the applicant is so powerful that a reasonable factfinder would have to conclude that the requisite fear of persecution exists."

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[1] Zheng also asserts that he qualifies for a stay of removal because he has a probability of success on the merits for his underlying claim, and the likelihood of harm and hardship if he is removed to China is high. We previously denied his "Motion for a Stay of Deportation," which we construed as a motion for stay of removal pending disposition of the appeal.

Mazariegos v. U.S. Att'y Gen., 241 F.3d 1320, 1323-24 (11th Cir. 2001).

To establish asylum eligibility, Zheng must, with specific and credible evidence, show (1) past persecution on account of a statutorily listed factor, or (2) a "well-founded fear" that the statutorily listed factor will cause future persecution. Ruiz v. U.S. Att'y Gen., 440 F.3d 1247, 1257 (11th Cir. 2006) (citing 8 C.F.R. § 208.13(a), (b)). The INA does not expressly define "persecution" for purposes of qualifying as a "refugee." But we have written that "[n]ot all exceptional treatment is persecution." Gonzalez v. Reno, 212 F.3d 1338, 1355 (11th Cir. 2000). We have described persecution as an "extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation, and that mere harassment does not amount to persecution." Sepulveda, 401 F.3d at 1231 (quotations and internal marks omitted).

Although under certain circumstances detention may rise to the level of persecution, Zheng's five-day detention during which he was not harmed does not compel the conclusion that he experienced past persecution. See Sepulveda, 401 F.3d at 1231 (concluding that menacing phone calls and threats to family members and other members of group did not rise to level of past persecution); Gebremariam v. U.S. Att'y Gen., 126 Fed. Appx. 934, 937 (11th Cir. 2005) (unpublished) (concluding that 14-day detention did not rise to level of past persecution); see also Dandan v. Ashcroft, 339 F.3d 567, 573-74 (7th Cir. 2003) (finding no persecution when petitioner was detained for three days without

food during which time he was beaten, resulting in swollen face); Fesseha v. Ashcroft, 333 F.3d 13, 19 (1st Cir. 2003) (finding no persecution when petitioner was subjected to occasional 24-hour detentions); Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995) (finding no persecution when petitioner was held in detention for four to six hours, hit in the stomach, and kicked from behind); Mendez-Efrain v. INS, 813 F.2d 279, 282-83 (9th Cir. 1987) (finding no persecution when petitioner was detained and interrogated for four days). We accept that, during his detention, Zheng was forced to watch anti-Falun Gong reeducation videos, to stand in the sun for two hours, and to sign a pledge to no longer practice Falun Gong. But no evidence shows that Zheng was hurt during this detention. See Diallo v. Ashcroft, 381 F.3d 687, 698 (7th Cir. 2004) (reviewing circuit precedent and concluding that "short detentions or detentions without physical abuse seem to have been less apt to reach the 'persecution' threshold").

Zheng's termination from his job and his inability to find another job in Quandong City is also insufficient to show past persecution. "[E]mployment discrimination which stops short of depriving an individual of a means of earning a living does not constitute persecution." Barreto-Claro v. U.S. Att'y Gen., 275 F.3d 1334, 1340 (11th Cir. 2001). Although Zheng testified that he was unable to find work in Quandong City after he was fired, he did not say how long he searched for a job; and no evidence shows that he sought employment for the three years he lived in his parents'

village.[2] Zheng's evidence is accordingly insufficient to compel a finding that he was deprived of all means of earning a living. That local officials watched Zheng while he lived with his parents and occasionally searched his parents' house also constitutes mere harassment and does not compel a conclusion that Zheng suffered past persecution. See Sepulveda,401F.3d at 1231.

Substantial evidence also supports the IJ's determination that Zheng failed to establish a well-founded fear of future persecution. If an alien does not establish past persecution, he bears the burden of showing a well-founded fear of persecution by showing these things: (1) he fears persecution based on his membership in a particular social group, political opinion, or other statutorily listed factor; (2) there is a reasonable possibility that he will suffer persecution if removed to his native country; and (3) he is unable or unwilling to return to his native country because he fears persecution. 8 C.F.R. § 208.13(b)(2)(i). To establish a "well-founded fear," Zheng must demonstrate that his fear is both subjectively genuine and objectively reasonable. Ruiz, 440 F.3d at 1257.

Zheng argues the IJ failed to consider the evidence within the context of the Chinese government's overall persecution of Falun Gong practitioners. We disagree. The IJ considered the 2002 Country Report, which detailed the Chinese

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[2] The IJ noted specifically in his decision that "although [Zheng] lost his job, he's presented no evidence that he was not able to obtain other type [sic] of work or perhaps aid his parents with whatever they were doing to make a living or to farm."

government's efforts to repress Falun Gong. But the Report also states that Falun Gong followers were generally released from detention and that the harshest punishments were reserved for core leaders of the movement. Zheng conceded he is not a Falun Gong leader. The evidence further indicates that Zheng was able to relocate to his parents' rural village and to live there for three years without being detained again or physically harmed despite that he admits he continues to practice Falun Gong.[3] We therefore conclude that Zheng has not carried his burden to show a reasonable possibility of future persecution upon his return to China.

Because we conclude that Zheng has not satisfied the less stringent standard for asylum, we also deny his petition for review of his claims for withholding of removal under the INA and for CAT relief. See Forgue v. U.S. Att'y Gen., 401 F.3d 1282, 1288 n.4 (1 1th Cir. 2005) (noting that where petitioner fails to establish claim of asylum on merits, his claims for withholding of removal and CAT relief necessarily fail); Al Najjar, 257 F.3d at 1292-93, 1303 (same).

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[3] Zheng cannot have a well-founded fear of persecution if he could avoid persecution by relocating to another part of China, if under all the circumstances it would be reasonable to expect him to do so. 8 C.F.R. § 208.13(b)(2)(ii). Because we conclude that Zheng has not established a reasonable possibility of suffering future persecution, we need not decide whether relocation is reasonable. That Zheng successfully avoided persecution for three years in his parents' village is evidence indicating there is not a reasonable possibility Zheng will suffer future persecution upon his return to China.

IV. CONCLUSION

Involvement with Falun Gong in China by itself does not entitle a person to asylum in the United States. We conclude that the IJ's decision is supported by substantial evidence and deny Zheng's petition.

PETITION DENIED.

United States
Court of Appeals
For the Eleventh Circuit

No. 05-12818

Agency No.
A78-910-135

[ENTERED: June 14, 2006]

YI FENG ZHENG,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

---

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	June 14, 2006
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A78-910-135 - Atlanta Date

In re: ZHENG, YI FENG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shang, Quincy A.

ON BEHALF OF DHS: Rhodes, Rhoshunda R.

[ENTERED: APRIL 22, 2005]

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/S/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW UNITED STATES
IMMIGRATION COURT
Atlanta, Georgia

File A 78 910 135 December 16, 2003

[ENTERED: AUGUST 30, 2004]

In the Matter of

YI FENG ZHENG, IN REMOVAL
Respondent PROCEEDINGS

CHARGE: Section 212(a) (6) (A-) (i) being present in the United States without having being admitted or paroled.

APPLICATION: Asylum, withholding of removal, and protection under the United Nations Convention Against Torture.

ON BEHALF OF RESPONDENT:
Quincy Shang, Esquire
3147 Shallowford Road
Atlanta, Georgia, 30341

ON BEHALF OF THE GOVERNMENT
Morris Onyewuchi, Esquire
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year-old single male, native and citizen of the People's Republic of China, who arrived in the United States on or about December 19th, 2002, at or near San Ysidro, California, without having been inspected or paroled by an Immigration officer.

December 21st, 2002, the Service issued a Notice to Appear charging the respondent with removabilty, pursuant to the above captioned provision of the Act. The respondent through counsel admitted the allegations of fact contained the Notice to Appear and conceded removabilty. On the basis of the respondent's admissions and other records admitted into evidence, I find that the respondent's removabilty has been established, in that the respondent has not shown that he is clearly and beyond doubt, entitled to be admitted to the United States and is not inadmissible.

The respondent declined to designate a country of removal, and People's Republic of China was directed by the Court. The respondent applied for relief from removal in the form of, asylum under Section 208 of the Act. Applications for asylum shall also be considered as applications for withholding of removal under Section 241(b) (3) (A) of the Act. The respondent is also requesting withholding of removal under Article 3 of the United Nations Convention Against Torture. He has not requested voluntary departure.

SUMMARY OF FACTS

Evidence in this case consists of four exhibits, and the testimony of the respondent which in summary is as follows. That he began practicing Falun Gong, in March 1998. He had no problems until August 18th, 1999, when some individuals from the police came to his place of employment, arrested him and took police office. While there he saw a member of other Falun Gong practitioners, he was questioned about who their instructor was and informed that Falun Gong was an evil cult, which interfered with the stability of society. He refused to divulge the name of his instructor and he and his fellow practitioners were forced to read materials and watch videos which were anti Falun Gong. He indicated that if you refused to do that, you were taken to the exercise yard where you were made to stand until such time as you consented to watching. He indicated he initially refused to watch the video tape and was drug by his arms to the exercise yard and then after two hours of standing he consented to watch a video tape and he was released after five days after he made a pledge that he would no longer practice Falun Gong. After his release, he returned to his place of employment and was informed that he had been fired because of his Falun Gong activities. He thereafter went back to the village where his parents lived and was watched by the village officials, occasionally they came to his house and looked to see if he had Falun Gong material and that he was shunned by the other villagers. He remained in the village from approximately the end of August or beginning of September of 1999 until he departed China on September 17th, 2002. He fear his

returning to China because he would be put in prison, because they told him if he continued to practice Falun Gong he would be imprisoned. His claim for asylum is based on past persecution and the fear of continuing persecution on account of his Falun Gong activities.

STATEMENT OF THE LAW

The respondent in this case has satisfied the requirement of showing by clear and convincing evidence that he applied for asylum within one year of his last arrival. In that he arrived in the United States on or about December 19th, 2002 and the application for asylum for asylum was received on August 7th, 2003.

The respondent bears the evidentiary burdens of proof and persuasion on applications for both asylum and withholding of removal. Matter of Acosta. Int. Dec. 211 (BIA 1985), reversed on other grounds. To establish eligibility prior grant of asylum a respondent must demonstrate that he is a refugee within the meaning of the Section 101(i)(42)(R)(J) of the Act. That section defines refugee as any person who is unable or unwilling to return to his home country because of-persecution or a well founded fear pf persecution on account race, religion, nationality, membership in a particular social group, or political opinion. A respondent has established that his fear his well founded if he shows that a reasonable person in his circumstances would fear persecution. Matter of Mogharrabi. 19 I&N Dec. 439 (BIA June 1987).

To establish eligibility for of removal pursuant to Section 241 (b) (3) (A) of the Act, the respondent must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. INS v. Stevic, 460 U.S. 407 (1984) This means that the respondent facts must establish that it is more likely than not that he would subject to persecution for one of the grounds specified in the Act.

In considering the Convention Against Torture claim, the Court must first determine whether the respondent has established that it is more likely than not, that he would be tortured if removed to the proposed country of removal. 8 C.F.R. Section 208.16(c) For the more likely than not standard is the same standard as withholding of removal under Section 241(b)(3) of the Act.

ANALYSIS AND FINDINGS OF FACT

The credibility of the respondent is of extreme importance in assessing his claim. In determining the credibility, the respondent's testimony, I have taken into account not only his demeanor while testifying, -but also the rationality and (indiscernible) consistency and inherent persuasiveness of his testimony. Furthermore the respondent must also establish that the facts if true, would satisfy the stated standards of eligibility for the relief requested.

In this case the testimony of the respondent was consistent with his written application for

asylum therefore I have no reason to doubt the credibility of the respondent. That being the case the issue becomes, has he met his burden of proof to establish either past persecution or a reasonable and well found fear of future persecution. In this case I don't believe the respondent has met his burden of proof. The only thing that he testified about was that on one occasion, he was arrested and taken to the police station and held for five days. During that time he was made to read materials and watch videos that were anti Falun Gong. When he was asked some questions about Falun Gong and told that Falun Gong was an evil cult. He did not testify to any physical mistreatment, other than when he refused to watch the video, he was drug by his arms to an exercise yard and made to stand in the exercise area, until such time as he consented to watching the video. He indicated that was about two hours. After five days he signed a pledge not to practice Falun Gong again and was released. He did lose his job and returned to the countryside where he indicated he did nothing for the next three years. He testified during that three years, that on occasion, the village officers would come by the house to see if he had any Falun Gong materials. Only there was no testimony or evidence presented that he was in any way mistreated or persecuted during those three years. Other than perhaps his fellow villagers who may be did not agree with his beliefs, with regard to Falun Gong, would have nothing to do with him. In the Court's opinion, this does not meet his burden of proof with regard to past persecution. What he described does not rise to the level of persecution. A short detention, without any physical maltreatment is certainly not persecution and although he lost his

job, he's presented no evidence that he was not able to obtain other type of work or perhaps aid his parents with whatever they were doing to make a living or to farm. So, the Court does not believe that what this respondent testified about, as having occurred to him amounted to persecution. Additionally, he indicated that he lived for three years in China in essence without anything happening to him. Certainly, if the Chinese Government were intent on persecuting him because of his Falun Gong activities they would have done so during that three year period, when in fact according to his own testimony, they did nothing. I introduced into the record, Exhibit 4, the excerpt from the Country Report on Human Rights practices and there is a discussion in here about Falun Gong and that in fact, the Government of China did do a crack down on Falun Gong, and that although followers of Falun Gong were arrested, most were released after short detentions unless they were leaders, and the leaders were the ones who were singled out for harsher treatment and that this respondent in his own testimony indicated he not a leader. Thus I don't believe that the respondent has met his burden to establish that he was persecuted in China. That being the case, the burden remains on him with regard to the issue of a reasonable and well founded fear of future persecution and based on the evidence I don't believe he meets that. As well as the background information as I indicated a moment ago, it indicates that the followers are not being singled out for harsh treatment only the leaders. Further he was able to live in China for a period of three years without problem. Thus, as he's failed to v meet his burdens with regard to both past and

future persecution he's failed to establish the burden of proof necessary for asylum.

In as much as he has failed to satisfy the lower burden of proof required for asylum, it necessary follows that he's failed to satisfy the clear probability standard off eligibility required for withholding of removal. (Indiscernible) not established that (indiscernible) return to the People's Republic of China, it is more likely than not that he would be subject to persecution.

As in withholding of removal under Section 241(b)(3) of the Act, the Court finds that the respondent has failed to satisfy the clear probability standard of eligibility required for consideration under Article 3 of the United Nations Convention Against Torture, and he has not established that if he's returned to the People's Republic of China it' s more likely than not that he would subject to torture.

ORDERS

For all the foregoing reasons, the following orders will be entered.

IT IS HEREBY ORDERED that the respondent's application for asylum be denied.

IT IS FURTHER ORDERED that the respondent' s application for withholding of removal pursuant to Section 241(b) (3) (A) of the Act be denied.

IT IS FURTHER ORDERED that the respondent' s application for withholding of removal under Article 3 of. the United Nations Convention Against Torture be denied.

IT IS FURTHER ORDERED that the respondent shall be removed from the United States to the People's Republic of China on the basis of the charge contained in the Notice to Appear.

Warning to the respondent. An order of removal has been entered against you, if you fail to appear pursuant to a final order of removal at the time and place ordered by the Service for other than exceptional circumstances beyond your control, you will not be eligible for voluntary departure, cancellation of removal, and any change or adjustment of status, for ten years from the date you're scheduled to appear.

/S/
Paul L Johnston
Immigration Judge
August 30, 2004

CERTIFICATE PAGE

I hereby certify that the attached proceeding before PAUL L. JOHNSTON in the matter of:

YI FENG ZHENG
A 78 910 135
Atlanta, Georgia

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/S/
ROSE CLARK(Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

August 8. 2004
(Completion Date)

OPPOSITION BRIEF

FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 06-367

In the Supreme Court of the United States

YI FENG ZHENG, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the immigration judge's findings that petitioner failed to demonstrate past persecution or a reasonable possibility of future persecution if he is removed to the People's Republic of China.

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In the Supreme Court of the United States

No. 06-367

YI FENG ZHENG, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 451 F.3d 1287. The decisions of the immigration judge (Pet. App. 13a-22a) and the Board of Immigration Appeals (Pet. App. 12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2006. The petition for a writ of certiorari was filed on September 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) defines a "refugee" as an alien who is "unable or unwilling to return" to his country of origin "because of persecution or a well-founded fear of persecution on account of

race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a "refugee," he may, in his discretion, grant the alien asylum in the United States. REAL ID Act of 2005, Pub. L. No. 109-13, Tit.I, § 101(a), 119 Stat. 302-303 (to be codified at 8 U.S.C. 1158(b)(1)(A)). In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3). That standard is more demanding than the standard for demonstrating eligibility for asylum. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-431 (1987). The applicant bears the burden of establishing that he or she is a refugee eligible for asylum or that his or her life or freedom would be threatened so as to warrant withholding of removal. 8 C.F.R. 208.13(a), 208.16(b).

For purposes of both forms of relief, "persecution" generally refers to significant mistreatment by the government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Persecution is an "'extreme concept,' requiring 'more than a few isolated incidents of verbal harassment or intimidation,' and [] '[m]ere harassment does not amount to persecution.'" *Sepulveda* v. *United States Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (quoting *Gonzalez* v. *Reno*, 212 F.3d 1338,

1355 (11th Cir.), cert. denied 530 U.S. 1270 (2000)); see *Nelson* v. *INS*, 232 F.3d 258, 263 (1st Cir. 2000).

2. Petitioner is a native and citizen of the People's Republic of China (PRC). Pet. App. 14a. Petitioner began practicing Falun Gong in March 1998. *Id.* at 15a. He was never a leader of his Falun Gong group. *Id.* at 19a. In July 1999, the Chinese government banned the practice of Falun Gong. Pet. 3. On August 18, 1999, petitioner was arrested, taken to a police station, and placed in custody with other Falun Gong practitioners. Pet. App. 15a. He was informed by the police that Falun Gong was an evil cult that interfered with the stability of society, and was questioned about the identity of his Falun Gong instructor. When he refused to identify his instructor, he was forced to read anti-Falun Gong materials and watch anti-Falun Gong videotapes. *Id.* at 15a, 18a. Petitioner initially refused to watch the videotapes, and therefore was dragged to an exercise courtyard and required to stand in the sun for approximately two hours. He later agreed to view the tapes. After five days, petitioner promised to cease practicing Falun Gong and was released from custody. *Ibid.*

Upon returning to his place of employment in Guandong City, petitioner was informed that he had been fired because of his Falun Gong activities. Pet. App. 2a, 15a, 18a. Unable to find other work in the city, *id.* at 2a, petitioner returned to his parents' village, where he remained for approximately the next three years. *Id.* at 2a, 15a, 18a. During that time, village officials observed him and occasionally searched his house for Falun Gong materials. He also claimed that other villagers shunned him. *Ibid.*

Petitioner left China on September 17, 2002, and arrived in the United States on or about December 19,

2002. Pet. App. 2a, 14a, 15a. After being placed in removal proceedings, petitioner applied for asylum, withholding of removal, and other relief based on the United Nations Convention Against Torture. *Id.* at 1a, 14a.[1]

3. a. The immigration judge (IJ) found that petitioner failed to demonstrate that he faced past persecution or a well-founded fear of future persecution. Pet. App. 17a-20a; see 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. 208.13(a). The IJ, after crediting petitioner's account of the events in China, found that petitioner's short detention with minimal physical mistreatment did not amount to persecution. Pet. App. 18a. The IJ also noted that petitioner thereafter lived in China for three years without incident and that there was no evidence that petitioner was unable to obtain other work. *Id.* at 18a-19a. As to future persecution, the IJ cited a 2002 State Department report on conditions in China as evidence that petitioner's status as a mere practitioner of Falun Gong made persecution less likely. *Id.* at 19a (citing Certified Admin. Record (A.R.) 86, 91); U.S. Dep't of State, *China, Country Reports on Human Rights Practices – 2002*, at 1, 20 (Apr. 1, 2003) (Country Report). That fact, coupled with petitioner's previous experience in China, counseled against a finding of well-founded fear. *Id.* at 19a-20a.

b. The Board of Immigration Appeals affirmed without opinion. Pet. App. 12a; see 8 C.F.R. 1003.1(e)(4).

4. The court of appeals denied the petition for review. Pet. App. 1a-11a. The court held that substantial evidence supported the IJ's conclusion that petitioner was not persecuted in China. *Id.* at 6a-8a. The court

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[1] Petitioner does not challenge the court of appeals' denial of his Convention Against Torture claims.

found that neither petitioner's "five-day detention during which he was not harmed," *id.* at 6a, nor his "termination from his job and his inability to find another job in Quandong City," *id.* at 7a, "compel[led] a conclusion that [petitioner] suffered past persecution." *Id.* at 8a. Similarly, the court found that the IJ had substantial evidence to conclude that petitioner lacked a well-founded fear of future persecution. *Ibid.* In particular, the court affirmed the IJ's finding - based on the 2002 State Department Country Report - that mere practitioners of Falun Gong were treated less harshly than leaders. *Id.* at 9a. That fact, combined with evidence that petitioner lived in China for three years without incident, belied petitioner's claim that he faced a reasonable possibility of persecution upon his return to China. *Ibid.* Having failed to "satisfy[y] the less stringent standard for asylum," the court of appeals denied the petition for review with respect to petitioner's mandatory withholding and Convention Against Torture claims. *Ibid.*

ARGUMENT

The Board's or IJ's findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1, 483-484 (1992). The court of appeals correctly applied that deferential standard, and its fact-bound determination does not warrant this Court's further review.

Although the INA does not define "persecution," the Board and the courts of appeals have recognized that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive." *Ghaly* v. *INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)

(quoting *Fisher* v. *INS*, 37 F.3d 1371, 1381 n.8 (9th Cir., amended and superseded, 61 F.3d 1366 (9th Cir. 1994)); see *Sepulveda* v. *United States Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005); *Nelson* v. *INS*, 232 F.3d 258, 263-264 (1st Cir. 2000) ("To qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering."); *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."). The events that petitioner cited below to demonstrate past persecution do not—alone or together—compel the conclusion that a reasonable factfinder would reach a different result in this case. The IJ reasonably found that petitioner's short detention did not rise to the level of "persecution," Pet. App. 18a; see, *e.g.*, *Diallo* v. *Ashcroft*, 381 F.3d 687, 698 (7th Cir. 2004), that petitioner was not deprived of the ability to earn a living, Pet. App. 18a-19a, and that any additional burden imposed on petitioner for the three years following his detention was minimal. *Id.* at 19a. There is nothing to suggest that the IJ erred in evaluating the facts against the well-established standard for identifying conduct that amounts to persecution.

As to whether petitioner demonstrated a well-founded fear of future persecution, the IJ again applied the correct legal standard and no factual evidence compels a different conclusion. A "well-founded fear" has both objective and subjective components: To demonstrate a well-founded fear, an alien must show both that h[illegible]ubjectively fears persecution and that such fear is objectively reasonable. See *Shao* v. *BIA*, 465 F.3d 497, 501 (2d Cir. 2006); *Ruiz* v. *United States Att'y Gen.*, 440 F.3d 1247, 1257 (11th Cir. 2006); see also 8 C.F.R.

208.13(b)(2)(i) and (B), 1208.13(b)(2)(i) and (B) ("An applicant has a well-founded fear of persecution if * * * [t]here is a reasonable possibility of suffering such persecution if he or she were to return to [his or her] country [of removal]."). The IJ held that petitioner's limited role in the Falun Gong movement coupled with his previous time spent in China without incident undermined any reasonable belief that he would be subject to future persecution. Pet. App. 19a-20a; see *id.* at 8a-9a & n.3 (finding substantial evidence to support that holding).

Petitioner argues (Pet. 6) that the court of appeals' decision is at odds with the decisions of several other circuits that found Falun Gong practitioners eligible for asylum. Two of the decisions petitioner cites did not reach the underlying question whether the applicant had a well-founded fear of persecution. See *Gao* v. *Gonzales*, 424 F.3d 122, 129-130 (2d Cir. 2005) (remanding to the BIA for consideration of applicant's imputed political opinion theory); *Iao* v. *Gonzales*, 400 F.3d 530, 533-534 (7th Cir. 2005) (remanding for want of reasoned decisionmaking). In the two other cases petitioner cites, the particular applicant was deemed eligible for asylum, *Zhao* v. *Gonzales*, 404 F.3d 295, 310 (5th Cir. 2005), or mandatory withholding of removal, *Zhang* v. *Ashcroft*, 388 F.3d 713, 719-720 (9th Cir. 2004). No court of appeals has held that all Falun Gong practitioners are persecuted or have a well-founded fear of persecution. Nor could any court so hold; asylum determinations proceed "through a process of case-by-case adjudication," in which the Attorney General and the Secretary of Homeland Security are given significant deference. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Indeed, in every case petitioner cites, the court of appeals made a fact-specific, individualized determination whether the

applicant had a well-founded fear. See *Zhao*, 404 F.3d at 309 (considering Chinese government's "inten[tion] to[] crack down on Falun Gong practitioners" as one factor alongside the applicant's subjective fear and the likelihood that authorities could become aware of his Falun Gong practice); *Zhang*, 388 F.3d at 718-719 (determining eligibility for mandatory withholding of removal based on (a) persecution of the applicant's family, (b) previous identification of the applicant by Chinese authorities as an anti-government activist, and (c) country conditions evidence).

The IJ and the court of appeals in this case relied in part on the Department of State's 2002 Country Report on Human Rights Practices in China. Pet. App. 8a-9a, 19a; see A.R. 86, 87, 91; Country Report 1, 16, 20.[2] Petitioner argues (Pet. 6-13) that the court of appeals' interpretation of that report conflicts with several other circuits' use of the same or predecessor reports. State Department reports, however, are not given dispositive weight in asylum determinations. They are informative background and, when made part of the administrative record, provide useful context against which an applicant's individual circumstances can be measured. See, *e.g.*, *Tambadou* v. *Gonzales*, 446 F.3d 298, 302-303 (2d Cir. 2006); *Zheng* v. *Gonzales*, 409 F.3d 804, 811 (7th Cir. 2005); *Gjyzi* v. *Ashcroft*, 386 F.3d 710, 715 n.1 (6th

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[2] The report stated that "[s]ince the Government banned the [Falun Gong] in 1999, the mere belief in the discipline * * * has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Although the vast majority of practitioners detained since 2000 were released, those identified by the Government as 'core leaders' have been singled out for particularly harsh treatment. * * * However, most practitioners were punished administratively." A.R. 91.

Cir. 2004); *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1236 n.12 (10th Cir. 2004). Petitioner therefore is mistaken when he asserts that different uses or applications of the State Department document create a circuit split that warrants review.

It is no surprise, moreover, that courts of appeals have reached different conclusions in similar immigration cases. Asylum determinations are highly fact-specific and largely left in the discretion of the immigration judge. A "court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 113 (1992). Although a different factfinder may have credited different evidence to reach a different conclusion, the court of appeals correctly deferred to the IJ's reasonable determination. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). No further review of this fact-bound conclusion is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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